Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

October Term, 1999

Joseph G. Stepard and Malania M. Stepard,
Husband and Wife, John P. Wilde, Eileen Lipari

Petitioners,

v.

United States of America

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the jurisdiction of the subject matter was lacking in both the district court and court of appeals after the Respondent failed to prove that, pursuant to 26 U.S.C. §§ 7401 and 7403, the Secretary or his delegate authorized or sanctioned the proceedings and the Attorney General or her delegate directed that the action to collect or recover taxes from Petitioners Joseph and Malania M. Stepard and to forelose the tax liens against certain real property currently owned by Petitioners John P. Wilde and Eileen Lipari.

2. Whether the jurisdiction of the subject matter was lacking in both the district court and court of appeals after the Respondent failed to plead and prove that the Secretary or his delegate failed to determine and mail notice of deficiency required under the provisions of 26 U.S.C. §§ 6212 and 6213.

3. Whether the action of *United States v. Stepard, et. al.*, CIV 93-0919 PHX EHC, United States District Court in and for the District of Arizona, was subject to the rule of compulsory counterclaim and should have been brought as a counterclaim to *Stepard et. al. v. United States*, CIV 93-0060 PHX PGR, United States District Court in and for the District of Arizona, instead of as a separate cause of action.

4. Whether Petitioners John P. Wilde and Eileen Lipari should have been substituted, pursuant to Rule 25, Federal Rules of Civil Procedure, and granted standing to defend their interests in the property as the assignees and successors in interest in the property, where such assignment was made pursuant to Arizona Law.

THE PARTIES

In addition to the parties identified on the cover to this Petition, International Tax Strategies, in its capacity as Trustee of Betach LT01 Trust and Chacah LT01 Trust and Jimmy C. Chisum were originally named as parties in the action. Betach LT01 Trust and Chacah LT01 Trust were the owners record of the subject property at the commencement of the action in the district court. Jimmy C. Chisum was doing business as (d/b/a) International Tax Strategies at the time the action was commenced. In his capacity as the Trustee of Betach LT01 Trust and Chacah LT01 Trust he made the assignment of interest in the subject property to John P. Wilde and Eileen Lipari. Jimmy C. Chisum was also named in his capacity as Trustee of Jo-Mal Trust.

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The Petitioners, Joseph G. Stepard and Malania M. Stepard, husband and wife (Stepards) and John P. Wilde and Eileen Lipari, hereby Petition this Court for its Writ of Certiorari to the United States Court of Appeals in and for the Ninth Circuit to review its August 13, 1999 memorandum.

OPINION OF THE COURT BELOW

The decisions and orders of the United States District Court in and for the District of Arizona and the United States Court of Appeals in and for the Ninth Circuit were unpublished and are found in Appendix A to this Petition.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment affirming the District Court's judgment on August 13, 1999. [App., Pgs. A-1 to A-2]. The Petitioners timely filed their Petition for Rehearing which was denied on January 13, 2000. [App., Pg. A-5]. The jurisdiction of this Court to review the judgment of the United States Court of Appeals by writ of certiorari is invoked under the provisions of 28 U.S.C § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following Statutes and Rules are involved. The text of each provision is found in Appendix B. 26 U.S.C. §§ 6212(a) and (b), 6213(a), 7401 and 7403; Rules 12(h)(3), 13, 24 and 25, Federal Rules of Civil Procedure; Rule 17(b), Arizona Rules of Civil Procedure.

STATEMENT OF THE CASE AND FACTS

1. This was an action commenced by the Respondent United States against Petitioners Joseph G. Stepard and his wife Malania M. Stepard, to reduce income taxes alleged to have been assessed against the Stepards for the years 1981 through 1985. [App., Pg. A-29]. Although not a party to this appeal, the original complaint also named Jimmy C. Chisum in his capacity as Trustee of Jo-Mal Trust and International Tax Strategies (ITS) in its capacity as

Trustee of Betach LT 01 Land Trust and Chacah LT 01 Land Trust. *id.*

2. On January 8, 1993, the Petitioners commenced an action in quiet title, pursuant to 28 U.S.C. § 2410 against the Respondent United States. [App., Pg. A-19]. It was named ***Stepard, et. al. v. United States***, CIV 93-0060 PHX RCB (Case I). The United States answered that Complaint on March 9, 1993. [App., Pg. A-25]. The Respondent then commenced this separate action on or about May 6, 1993. [App., Pg. A-29].

3. After the instant action (Case II) was filed, the Stepards moved to dismiss it raising on of the grounds that this action is subject to the rule of compulsory counter claims, and that it should have been brought as a counter-claim to Case I and not as a separate action. The District Court denied the Motion. [App., Pg. A-61]. The Ninth Circuit Court of Appeals did not rule on the issue.

4. In the complaint, the Respondent alleged that it had jurisdiction and that pursuant to 26 U.S.C. §§ 7401 and 7403, the action had been brought at the direction of the Attorney General and with the authorization and at the request of the Chief Counsel of the Internal Revenue Service. [App., Pg. A-3, ¶ 2]. Petitioners Joseph and Malania Stepard denied this allegation in their Answer [App., Pg. A-41]

5. Mr. Chisum in his capacity as Trustee of the Trusts[1] answered the complaint. The Respondent moved to strike Mr. Chisum's answer on the ground that he was not an attorney and could not represent either himself as Trustee of the Trusts or the Trusts themselves. The District Court granted the motion to strike and denied a Motion to Reconsider. [App., Pg. A-60].

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1 Although ITS was named as the Trustee of Chacah and Betach Trusts, ITS was actually a d/b/a under which Mr. Chisum operated. Thus, he claimed the authority to answer as Trustee for all three trusts. Jo-Mal, Chacah and Betach Trusts will all be referred to collectively as "Trusts" unless otherwise noted.

6. Once Mr. Chisum's answer had been stricken, and he was unable to afford an attorney to defend the Trusts, then Mr. Chisum, in his capacity as Trustee of the Trusts, assigned the Trusts' interest in the property to Mr. John Wilde and Mrs. Eileen Lipari, personally and not as Trustees of a trust. Mr. Wilde and Mrs. Lipari gave notice of the transfer of interest and moved to substitute themselves in the stead of Mr. Chisum and to change the caption to reflect the transfer. The Court would not permit Wilde or Lipari to be substituted, denying the Motion without prejudice [App., A-64] and instead ordered Wilde and Lipari to file a Motion to Intervene. The district court subsequently denied the Motion to Intervene finding that the transfer from the Trusts to Wilde and Lipari was fraudulent. That conclusion was affirmed by the Ninth Circuit. [App., Pg. A-2, n. 2]. Default judgment was also entered against Mr. Chisum. [App., Pgs. A-69 and A-71]

7. On June 29, 1998, the district court entered its judgment and order of foreclosure. [App., Pg. A-7]. The Petitioners promptly moved to vacate and dismiss on the ground that the court lacked jurisdiction. [App., Pg. A-91]. The district court denied the Motion. [App., Pg. A-15].

8. The Petitioners timely appealed to the Ninth Circuit, which affirmed the district court [App., Pg. A-1]. The Ninth Circuit denied the Petition for Rehearing. [App., Pg. A-5]. This Petition follows.

REASONS FOR GRANTING WRIT & ARGUMENT

1. In affirming the district court, the Ninth Circuit decided two important questions of law on federal court jurisdiction in a way that conflicts with its own decisions and decisions of a United States Court of Appeals and that also has not but should be decided by this court.

A. Jurisdiction Generally.

A United States District Court has generally such subject matter jurisdiction as the Congress shall establish and upon the conditions as the Congress may impose. "Federal courts are courts of limited jurisdiction. They possess only that power

authorized by Constitution and statute, (*cites omitted*), which is not to be expanded by judicial decree, (*cites omitted*)." *Kokkonen v. Guardian Life Ins. Co.*, 511 US 375, 377 (1994). *Bender v. Williamsport Area School Dist.*, 475 US 534, 541 (1986). The statutorily imposed **limits** upon federal jurisdiction are to be neither disregarded or evaded. *Owen Equipment & Erection Co. v. Kroger*, 437 US 365, 374 (1978). When the inquiry involves jurisdiction of the Federal Court, – the presumption at every stage of a cause is that the Court is without jurisdiction unless the contrary appears **in the pleadings and from the record** and the burden of establishing the existence of jurisdiction rests with the party asserting the existence of jurisdiction. *Kokkonen*, supra, 511 US at 377; *Miller & Lux Incorporated v. East Side Canal & Irrigation Company*, 211 US 293, 302 (1908).

When Congress prohibits the commencement of a civil action, unless certain specific acts are performed, the district Court has no jurisdiction over the subject matter until the **facts showing compliance are plead in the complaint** and established by proof should the facts alleged in the pleadings be denied. In other words, the Respondent had the responsibility of setting forth in the Complaint, the necessary facts to show compliance with specific acts imposed upon it by the Congress. *McNutt v. General Motors Accept. Corp.*, 298 US 178, 189 (1936). If the Plaintiff fails to allege the facts **in the Complaint**, the Court may not assume jurisdiction and proceed on the merits. *FW/PBS, Inc. v. Dallas*, 493 US 215, 231 (1990), citing *McNutt*, supra, at 189.

The fact that the Petitioners did not raise the jurisdictional defects until their post judgment motion [App., Pg. A-91] as the trial court, appellate court and this court are themselves duty bound to independently examine jurisdiction throughout the proceedings. *Andrus v. Charlestone Stone Products Co.*, 436 US 604 (1978); *Frederico Marin Gutierrez v. Waterman Steamship Corp.*, 373 US 206, 209 (1963), *reh den* 374 US 858.

In addressing the Petitioners' jurisdictional claim, the Ninth Circuit incorrectly limited its scope of review to the standards for

Rules 59 and 60, Federal Rules of Civil Procedure. The Petitioners' motion was more correctly presented under Rule 12(h)(3), Federal Rules of Civil Procedure and that because the Court lacked jurisdiction, it was necessary to vacate the judgment, whether it was based upon either of Rules 59 and 60, Federal Rules of Civil Procedure.

In the instant case, the Petitioners will show that the Respondent in the first circumstance plead jurisdictional facts in the complaint, but failed to show proof of those facts upon the Petitioner's denial in their answer. In the second circumstance, it will be shown that the Respondent failed to not only plead, but never proved compliance with the requisite conditions imposed by the Internal Revenue Laws. As a result, the judgment reducing the taxes to judgment and foreclosing the tax liens on the property are void.

B. Direction and authorization under 26 U.S.C. §§ 7401 and 7403.

Both 26 U.S.C. §§ 7401 and 7403 prohibit the commencement of any civil action to collect a tax under the Attorney General (or his delegate) and the Secretary (or his delegate) to direct and authorize and request the action to be taken. The authorization and request must be in writing. *Saltzman, IRS Practice and Procedure*, § 14.09 (1981)

The Respondent alleged in ¶ 2 of its complaint [App., Pg. A-30] that the Attorney General directed the action, with the authorization and at the request of the Chief Counsel of the Secretary of Treasury. The Petitioners denied this allegation in ¶ 2 of their Answer. [App., Pg. A-41]. Despite that denial, at no time did the Respondent produce the written direction, authorization and request, either in discovery, through disclosure or even during its Motion for Summary Judgment seeking to reduce to judgment the taxes alleged to be due and owing. The Respondent's Statement of Facts is found in the Appendix beginning at Page A-73. No authorization, request or direction is referred to in those Statement of Facts.

All of the lower courts that have decided the issue, including the Ninth Circuit have found that the direction, authorization and request is jurisdictional. *Palmer v. I.R.S.*, 118 F3d 1309 (9th Cir., 1997); *U.S. v. One 1941 Cadillac Sedan*, 145 F.2d 296 (7th Cir., 1944); *U.S. v. Twenty-Two Firearms*, 463 FSupp. 730 (D.Colo. 1979); *U.S. v. One 1972 Cadillac, Coupe DeVille, etc.*, 355 FSupp. 512, 514 (E.D.Ky., 1973). Jurisdiction has been been found when either the authorization has been produced or there has been no denial of jurisdiction.

Because the Petitioners denied the allegation that the suit was directed, requested and authorized, the burden shifted to Respondent to prove jurisdiction. The Respondent failed to prove the existence of jurisdiction. Therefore, the action should be dismissed.

C. Compliance with the deficiency procedures of 26 U.S.C. §§ 6212 and 6213.

Pursuant to 26 U.S.C. § 6212, the Secretary is authorized to send a Notice of Deficiency if the Secretary determines there is a deficiency. The Notice must be sent by certified mail. 26 U.S.C. § 6213(a) prohibits the assessment of any tax subject to the deficiency procedures and prohibits the any levy or commencement of any proceeding in court until the Notice of Deficiency is sent.

With this condition, it was necessary for the respondent to allege the facts in the complaint that the deficiency procedures have been complied with, and upon the Petitioners' denial prove that the deficiency procedures have been complied with. No allegation was made in the complaint [App., Pg. A-29] that the deficiency procedures were complied with and nothing in the record in reveals compliance with the deficiency procedures.

Only three published opinions from the lower courts could be found on compliance with the deficiency procedures. *United States v. Ball*, 326 F.2d 898 (4th Cir., 1964); *U.S. v. Wright*, 658 FSupp 1 (D.Alaska, 1986); *United States v. Williams*, 161 FSupp. 158 (E.D.N.Y., 1958). In each case, the courts found that the record did not contain any proof of compliance with the

deficiency procedures and in each case, the court decided against the United States. The Court in *Ball*, supra, vacated the district court judgment *sua sponte*.

Because there is no allegation in the complaint or evidence in the record to show compliance with the deficiency procedures. Therefore, this action should have been dismissed.

2. In affirming the district court, the Ninth Circuit decided an important question of law on compulsory counterclaims that has not but should be decided by this court.

The Petitioners were first to the Court house. They filed their complaint seeking to quiet title the internal revenue lien that arose from the assessments alleged to have been made against them. [App., Pg. A-19]. Both the Complaint in *Stepard v. United States*, CIV 93-0060 and *United States v. Stepard*, CIV 93-0919 involved the assessments for the years 1981 through 1985 and the liens arising therefrom.

In denying the Petitioners' Motion to Dismiss, the district court[2] merely focused on the form of actions between the two cases and not the underlying facts of the claims in each case.[3] Both actions clearly arose out of the same transactions, the assessments and liens arising therefrom, and thus, *United States v. Stepard* should have been brought as a counterclaim to *Stepard v. United States* instead of as a separate action. The only exception to this is if the action that would be the subject of the counter claim had not matured. 6 C *Wright and Miller & M. Kane, Federal Practice and Procedure*, § 1411, at 81 (2d Ed. 1990). Unfortunately, as was discussed in Part 1, ante, it has proven imposible to determine whether the cause matured, since

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2 The Ninth Circuit did not directly decide this issue. The only reference to this issue from the Ninth Circuit is that "the district court's orders" were affirmed. [App., Pg. A-3]

3 See *Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 536 (9th Cir., 1995); *Burlington Northern R. Co. v. Strong*, 907 F.2d 707, 711 (7th Cir., 1990);

the Respondent still have yet to produce the documents showing that the action had been directed, authorized or requested. Had the approval been received before March 8, 1993, when the Respondent's answer was due in *Stepard v. United States* then *United States v. Stepard* is subject to the rule of compulsory counterclaims. Because it was not filed as a counterclaim it should be barred. *Baker v. Gold Seal Liquors*, 417 US 467, 469 n1. (1974)

3. In affirming the district court, the Ninth Circuit decided an important question of law on substitution of parties after transfer of interest in property that has not but should be decided by this court.

The necessity to transfer interest from the Trusts to John Wilde and Eileen Lipari was created by the district court's own action. The Court refused to permit Mr. Chisum to proceed as the Trustee of the trusts and struck his answer to the complaint. None of the Trusts had the financial resources to retain licensed counsel. Thus, it was necessary to make an assignment of interest to Mr. Wilde and Mrs. Lipari personally where they would not require an attorney.

Substitution should be permitted as long as the cause of action survives the transfer to a new party. *Elca Enter. v. Sisco Equip. Rental & Sales*, 53 F.3d 186, 190-91 (8th Cir., 1995). Transfers of property are governed by state law. See *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 US 631, 634-35 (1949). In Arizona, actions that are not personal can be assigned. *Employers Casualty Company v. Moore*, 60 Ariz. 544, 547-48, 142 P.2d 414 (1943); *United Verde Copper Co. v. Jordan*, 14 F.2d 299, 301 (9th Cir., 1926). Rule 17(b), Arizona Rules of Civil Procedure.

Instead of substituting Wilde and Lipari for the Trusts and their Trustee Mr. Chisum, the Court ordered them to file a Motion to Intervene. Then after filing the Motion to Intervene, the district court concluded that it was a fraudulent transfer and denied the Motion. The Ninth Circuit upheld. [App., Pg. A-2 n3]

Because the substitution was not permitted no one was left withstanding to defend the property. This was improper. Eventually, default judgment was entered against Mr. Chisum and the Trusts. [App., Pgs. A-69 and A-71]

CONCLUSION

Accordingly and for the foregoing reasons, this Court should grant the Writ of Certiorari to the Ninth Circuit and remand this action with order that it be dismissed for lack or jurisdiction, or that it be dismissed for failure to bring this action as a compulsory counterclaim. In the alternative issue the Writ and remand it to the district court with Orders that Wilde and Lipari be substituted for the Trusts

RESPECTFULLY SUBMITTED this 17TH day of April, 2000.

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